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In The

Supreme Court of the United States

October Term, 1989

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICI CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION and ANTI DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF METRO BROADCASTING, INC.

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BRIEF AMICI CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION and ANTI DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF METRO BROADCASTING, INC.

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amici curiae* on behalf of its members and the Anti Defamation League of B'nai B'rith (ADL).[1]

[1] MSLF has obtained the written consent of the Solicitor General of the United States and counsel for Rainbow Broadcasting Company. The letters communicating such written consent have been filed with the Clerk of the Court.

INTEREST OF *AMICI CURIAE*

MSLF is a nonprofit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF has an extensive background and expertise in civil rights litigation.[2]

MSLF and its members oppose the use of affirmative action programs by federal, state or local entities when not adopted in direct response to specific acts of discrimination by governmental entities. Affirmative action programs are constitutionally permissible only when they seek to remedy such specific acts of discrimination. Affirmative action programs must be responsive to acts of discrimination by governmental entities and must adhere to easily discernible limiting principles under the Fifth and Fourteenth Amendments.

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[2] MSLF was counsel of record in both *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). In addition, MSLF has participated as counsel or *amicus* in many cases defining the scope and application of the Civil Rights Acts and the Fourteenth Amendment. *E.g., Marsh v. Board of Education*, 581 F. Supp. 614 (E.D. Mich. 1984), *aff'd*, 762 F.2d 1009 (6th Cir. 1985), *vacated and remanded*, 476 U.S. 1137 (1986); *NAACP v. City of Detroit*, 591 F. Supp. 1194 (E.D. Mich. 1984), *reversed and remanded*, 821 F.2d 328 (6th Cir. 1987); *AFSCME v. State of Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985), *reh'g denied*, 813 F.2d 1034 (9th Cir. 1987); *City of Richmond v. J.A. Croson Company*, 102 L Ed 2d 854 (1989).

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, whether they are members of a minority or the majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.[3]

The Anti-Defamation League has long opposed the use of racial preferences in a variety of contexts, taking the position that each person has a constitutional right to be judged on his or her individual merits, rather than as part of a particular gender, racial, or ethnic group. As this

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[3] Among its many activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this Honorable Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in cases such as *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hinting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Police Patrolmen's Ass'n., Inc. v. Castro*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Most recently, ADL filed an *amicus* brief in this Honorable Court in *City of Richmond v. J.A. Croson Company*, 102 L Ed 2d 854 (1989), arguing the unconstitutionality of that city's racial set-aside program.

Honorable Court has repeatedly held, a government preference that is not narrowly designed to remedy identifiable discrimination is necessarily unlawful. Such a preference is wholly at odds with the basic constitutional principles that all persons are entitled to be free from discrimination on grounds of race, religion, creed, sex, or national origin, and that each person has a right to be judged on the basis of his or her own individual merit – not on the basis of the group to which he or she happens to belong.

The decisions of this Honorable Court in *Wygant v. Jackson Board of Education* and *City of Richmond v. J.A. Croson Company* provide the principles by which the nation must be guided. MSLF and its members and the ADL urge this Honorable Court to reverse the decision of the Court of Appeals for the District of Columbia, and to hold that the *Wygant* and *Croson* "strict scrutiny" standard of review applies to the minority preference policy created by the Federal Communications Commission (FCC).

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amici curiae adopt the statement of the case and the statement of the facts as set out in the Petitioner's Brief.

SUMMARY OF ARGUMENT

The use by the FCC of a race-based system in the awarding of television broadcasting licenses compels the

application of the "strict scrutiny" standard of review. Application of that standard of review requires a search for a "compelling governmental interest" in the use by the FCC of a race-based system; yet that search yields no such compelling governmental interest. The absence of any allegation, let alone facts to support an allegation, that the FCC has discriminated against any segment of American society deprives the FCC of a "governmental interest." The only announced goal of the use by the FCC of a race-based system, that is, "program diversity," falls far short of the "compelling" interest required by the "strict scrutiny" test.

Even if there was a "compelling governmental interest" in the use by the FCC of a race-based system – and there is no such interest – that use has failed to comply with the second prong of the "strict scrutiny" test; that is, narrow tailoring. The segment of American society sought to be served by the use of a race-based system has neither been ascertained nor targeted. The FCC has failed to consider race-neutral means to achieve its goal of "program diversity." In place since 1978, the use of this race-based system by the FCC appears both "ageless in [its] reach into the past and timeless in [its] ability to affect the future."[4]

The actions of Congress, in passing annual appropriations for the FCC, are irrelevant to a consideration of the constitutionality of the use by the FCC of a race-based system. Therefore, the decision of this Honorable Court in *Fullilove v. Klutznick* is inapplicable.

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[4] *Wygant*, 476 U.S. at 276.

The use by the FCC of a race-based system has its origins, not in an Act of Congress, but in decisions of the Court of Appeals for the District of Columbia. The adoption by Congress, in 1987, of the Continuing Resolution under which the FCC was funded – and its use of a race-based system perpetuated – is merely an *ex post facto* endorsement of a long-standing, judge-made, FCC policy. Even if the adoption of the Continuing Resolution was a proper reflection of the will of Congress and, for a variety of reasons, it was not – the U.S. Congress, by prohibiting "fact-finding" regarding the use by the FCC of a race-based system, has engaged in actions which, if not *ultra vires*, at the very least deny Congress the deference accorded it in *Fullilove* – where fact-finding preceded the use of a race-based remedy.

Finally, *Fullilove* was a facial challenge in which this Honorable Court addressed, in the abstract, the issue: Could the U.S. Congress, under the spending power of the Welfare Clause, make use of a race-based remedy? The instant case is not a facial challenge, but concerns the actual application of a race-based system adopted, not by the U.S. Congress, but by an independent regulatory agency pursuant to court order. Even *ex post facto* endorsement by the Continuing Resolution of the use by the FCC of a race-based system does not permit application of the rubric of *Fullilove*. Missing in the instant case, but present in *Fullilove*, are Congressional "fact-finding" to ascertain a history of discrimination and the use of a waiver provision that permits case-by-case abandonment of any race-based remedy. In the instant case the use by the FCC of a race-based system was mandated in the

consideration of each and every application, regardless of the facts.

The notion that five individuals – appointed as Commissioners of the FCC – together with their individual and agency staffs, will seek " program diversity" by the use of a race-based system is frightening and Orwellian. It is also unconstitutional. It violates the equal protection component of the due process clause of the Fifth Amendment to the Constitution of the United States of America.

ARGUMENT

I. THE PROPER STANDARD OF REVIEW TO BE APPLIED IN CONSIDERING THE CONSTITUTIONALITY OF A RACE-BASED SYSTEM, WHETHER "REMEDIAL" OR "BENIGN," IS THAT OF "STRICT SCRUTINY," THE APPLICATION OF WHICH RENDERS THE USE BY THE FEDERAL COMMUNICATIONS COMMISSION OF A RACE-BASED SYSTEM A VIOLATION OF THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

A. The Use Of Race As A Basis For Federal Decision-Making Compels Application Of The "Strict Scrutiny" Standard In Determining The Constitutionality Of Federal Action.

In 1986, this Honorable Court resoundingly stated that the proper, indeed the only, standard of review when considering race-based programs or preferences is "strict

scrutiny."[5] "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[6] In 1989, this Honorable Court invoked the "strict scrutiny" standard and delineated the process by which it is to be applied.[7]

As Justice O'Connor, writing for the majority in *Croson*, noted:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate use of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.
>
> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. (citation omitted) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth.") We thus reaffirm the view

[5] *Wygant*, 476 U.S. at 273.

[6] *Id.*

[7] *Croson*, 102 L Ed 2d at 882.

> expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.[8]

Justice O'Connor concluded that the use of a race-based system denies personal rights that are guaranteed to the individual by the Equal Protection Clause:

> The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws" (emphasis added). As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. (citation omitted) The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.[9]

The guarantee of our Constitution that these personal, individual rights will not be denied by the use of a race-based system applies to every governmental entity. Otherwise our Constitution is for naught, for the liberties guaranteed therein will soon become victims of "racial politics."

[8] *Croson*, 102 L Ed 2d at 881-82.

[9] *Croson*, 102 L Ed 2d at 881.

This Honorable Court now has the opportunity to demonstrate once more that the teachings of *Wygant* and *Croson* apply to the use of a race-based system by *any* governmental entity, whether Congress, state or local governments, or, as here, an independent regulatory agency.

B. The Federal Communications Commission Has Failed To Demonstrate That Its Use Of A Race-Based System Has Been Undertaken On Behalf Of A "Compelling Governmental Interest."

Wygant and *Croson* require that the use of a race-based system be justified by "a compelling governmental interest."[10] First, the government entity must demonstrate that it has an "interest," which interest may be the result of its own record of racial discrimination. Second, that governmental interest must be "compelling." In the instant case the FCC has failed to comply with either aspect of the "compelling governmental interest" test.

First, the FCC disclosed no history of discrimination by the FCC in the awarding of television broadcasting licenses. The FCC merely decried "the continuing underrepresentation of minorities in broadcast ownership," and set as its goal the achievement of "full minority participation in the ownership and management of broadcast facilities."[11] The FCC asserted that "[u]nless minorities are

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[10] *Wygant*, 476 U.S. at 276, 285. *Croson*, 102 L Ed 2d at 884.

[11] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978).

encouraged to enter the mainstream of the commercial broadcasting business," the FCC would not achieve its goal.[12] Second, the FCC set forth, as the "interests" which it sought to achieve, in addition to "full minority participation," those of "programming diversity" and "diversification of ownership."[13]

1. The Federal Communications Commission Has Failed To Determine That It Has Engaged In A History Of Discrimination In Which It Has An Interest In Remedying.

The minority preference scheme utilized by the FCC, with no "findings" of discrimination whatsoever, does not fare well when held to the "strict scrutiny" standard of *Wygant* and *Croson*. Such is particularly the case given the call, throughout *Croson*, for "findings," "evidence," "specificity," and "identification."

As Justice O'Connor noted:

> In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief"

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[12] Minority Ownership Task Force, FCC, *Report on Minority Ownership in Broadcasting* 1 (1978).

[13] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978).

> for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications . . . ." (citation omitted) We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.[14]

The failure of the FCC to search for and find a history of racial discrimination by the FCC in its comparative licensing process compels a finding by this Honorable Court that the FCC has adopted, in a constitutionally deficient manner, a race-based system that must be stricken.

2. The Only Objective Apparently Sought By The Federal Communications Commission, That Is, "Program Diversity," Falls Far Short Of A "Compelling" Governmental Interest.

While the court below found the FCC minority preference policy to be consistent with the holdings of this Honorable Court in, for example, *Bakke* and *Fullilove*, a

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[14] *Croson*, 102 L Ed 2d at 889.

more careful review of the *Bakke* decision reveals just the opposite.[15]

The language of the *Bakke* decision which addressed "academic diversity," is closer to the instant case which concerns "program diversity," than is *Fullilove*, containing as *Bakke* does, a call for "heightened scrutiny" and the need for demonstration of a "compelling governmental purpose."[16] For it was in *Bakke* that this Honorable Court evaluated the goals of "academic diversity" and "the remedying of the effects of 'societal discrimination,' " and found neither to constitute a compelling governmental interest.[17]

Justice Powell's opinion concluded that the desire to have more black medical students or black doctors,

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[15] Judge J. Skelly Wright in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984) *cert. denied*, 470 U.S. 1027 (1985), announcing the opinion of the court, declared that "a number of factors show that the FCC's plan easily passes constitutional muster in light of various *Bakke* and *Fullilove* approaches." *West Michigan*, 735 F.2d at 613. This view was adopted by the majority in the instant case, *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989).

[16] *Croson*, 102 L Ed 2d at 883-84.

[17] *Bakke*, 438 U.S. at 307. Justice O'Connor reached a similar conclusion in *Croson*:

> Like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point."

Croson, 102 L Ed 2d at 885.

standing alone, was not sufficiently compelling to justify a racial classification, for it was "discrimination for its own sake," forbidden by the Constitution.[18]

In her opinion in *Croson*, Justice O'Connor discussed the approach of the Court in *Bakke*:

> Nor could the second concern, the history of discrimination in society at large, justify a racial quota in medical school admissions. Justice Powell contrasted the "focused" goal of remedying "wrongs worked by specific instances of racial discrimination" with "the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." (citation omitted) He indicated that for the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made. (citation omitted) Only then does the Government have a compelling interest in favoring one race over another. (citation omitted)[19]

The attempt of the FCC to achieve "program diversity" by the use of a minority preference policy fails because that goal falls far short of a "compelling" governmental interest. However, the FCC's minority preference policy is not merely constitutionally deficient, it is frighteningly Orwellian.[20] The specter of a handful of Americans – through the television broadcast licensing process – determining what particular programs are necessary to

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[18] *Bakke*, 438 U.S. at 307.

[19] *Croson*, 102 L Ed 2d at 884.

[20] *Shurberg Broadcasting of Hartford, Inc., v. FCC*, 876 F.2d 901, 920 n.27 (D.C. Cir. 1989).

achieve "diversity" is directly contrary to the goal sought by our Founding Fathers and strikes at the heart of the Constitutional guarantees of due process, of equal protection, and of freedom of speech.

Americans are a diverse people. However, the distinctions between and among us are not primarily racial; instead they are urban and rural, rich and poor, young and old, healthy and infirm. Our interests in radio and television broadcasts do not divide along racial lines, but along the other distinctions between and among American citizens. As Justice Scalia noted in *Croson:* "Racial preferences appear to 'even the score' (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races. . . ."[21]

The goal of program diversity is best achieved by the actions of a freely operating market place. The owners of a television station ignore their market, including that market's minority constituencies, only at the owners' economic peril.

Since the stated goal of the FCC's minority preference policy is not a "compelling" governmental interest, the use by the FCC of a race-based system is constitutionally deficient and must be stricken.

C. The Federal Communications Commission Has Failed To Narrowly Tailor Its Use Of A Race-Based System.

Justice O'Connor faulted the race-based system adopted by the City of Richmond for the city's failure to

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[21] *Croson*, 102 L Ed 2d at 904.

make specific findings of past state-sponsored discrimination: "It is almost impossible to assess whether the . . . [minority preference program] is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way."[22]

Justice O'Connor further detailed the need for narrow tailoring in her opinion in *Croson*, quoting *Wygant* with approval:

> Consideration of race-neutral means, an element of narrow tailoring, is revealed through "strict scrutiny" as are surveys of minority experience in the subject industry, so that a governmental entity could demonstrate "a strong basis in evidence for its conclusion that remedial action was necessary." (citation omitted)[23]
>
> Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.[24]

Narrow tailoring also compels limits on scope and duration, neither of which are limited in the use by the FCC of a race-based system. The FCC minority preference policy was adopted in 1978. It has continued unabated for

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[22] *Croson*, 102 L Ed 2d at 890.

[23] *Croson*, 102 L Ed 2d at 893.

[24] *Id.*

nearly 12 years. Given recent Congressional action in the appropriations process, it may continue indefinitely into the future. The question is, to what end?

The FCC, in adopting the minority preference policy, indicated that it sought "full minority participation."[25] Does that mean that the FCC's race-based system will continue in place until 20% of the radio and television stations currently operating in the United States are controlled by minorities?[26]

The FCC has selected a remedy that is truly "ageless in [its] reach into the past and timeless in [its] ability to affect the future."[27] Such a remedy runs afoul of the constitutional requirement that any race-based remedy be "narrowly tailored."

The FCC's minority preference policy is constitutionally deficient for its failure to be "narrowly tailored" and as a result must be stricken.

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[25] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978).

[26] The 20% figure is the FCC's. Minority Ownership Task Force, FCC, *Report on Minority Ownership in Broadcasting*, 1 (1978).

[27] *Wygant*, 476 U.S. at 276.

II. THE ADOPTION BY CONGRESS, IN 1987, OF THE CONTINUING RESOLUTION UNDER WHICH THE FEDERAL COMMUNICATIONS COMMISSION WAS FUNDED – AND ITS USE OF A RACE-BASED SYSTEM PERPETUATED – FAILS TO BRING THIS CASE WITHIN THE DEFERENTIAL PURVIEW OF THE HOLDING OF THIS HONORABLE COURT IN *FULLILOVE V. KLUTZNICK*.

A. The Use By The Federal Communications Commission Of A Race-Based System Was Undertaken Due to Decisions Of The Court Of Appeals For The District Of Columbia; The Adoption By Congress Of The Continuing Resolution Was Only An *Ex Post Facto* Endorsement Of A Long-Standing, Judge-Made, Federal Communications Commission Policy.

Until 1978, the FCC's criteria for comparative licensing proceedings were race-neutral. In 1978, as a result of two rulings of the Court of Appeals for the District of Columbia,[28] the FCC instituted the minority preference policy challenged here. In so doing, the FCC expressed the view that, as a result of "[a]cute underrepresentation of minorities among the owners of broadcast properties . . . , a substantial proportion of our citizenry will

[28] *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) and *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975). The *Garrett* court stated that "[t]he entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that 'reasonable expectation,' without 'advance demonstration,' gives them relevance." 513 F.2d at 1063 (footnotes omitted).

remain underserved and the larger, non-minority audience will be deprived of the views of minorities."[29] The goal sought by the FCC's race-based policy was "full minority participation in the ownership and management of broadcast facilities . . . to realize the fundamental goals of programming diversity and diversification of ownership which are at the heart of the Communications Act and the First Amendment."[30]

For nearly a decade, Congress was silent with regard to the manner in which the FCC awarded licenses under its comparative licensing procedure.[31] However, following the 1986 efforts of the FCC to reconsider the factual and legal bases for its minority preference policy, the Congress adopted appropriations language which denied to the FCC any funds for reexamining or abandoning the FCC's minority preference policy.[32]

In light of these facts, it is clear that what is before this Honorable Court is the constitutionality of the use by

[29] Minority Ownership Task Force, FCC, *Report on Minority Ownership in Broadcasting*, 1 (1978).

[30] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978).

[31] In 1982, the Congress, in amending the Communications Act of 1934, directed the FCC to provide a minority preference in the use of a random selection system for the awarding of licenses. The Congress did so as "[o]ne means of remedying the past economic disadvantage to minorities." H.R. Conf. Rep. No. 765, 97th Congr., 2d Sess. 44 (1982). The random selection or lottery system was not used in the instant case.

[32] A Joint Resolution Making Further Continuing Appropriations Act for the Fiscal Year 1988 and for Other Purposes, Pub.L.No. 100-202, 101 Stat. 1329.

the FCC of a court-ordered, race-based system. It is a system which the Court of Appeals imposed upon the FCC in order "to increase diversity of content, especially of opinion and viewpoint."[33] The Court of Appeals did so without any fact-finding whatsoever, without any allegation of, let alone any demonstration of, a history of discrimination by the FCC. The Court of Appeals based its decisions on only a "reasonable expectation" that the amorphous goal of "diversification of content" would be achieved by the use of race as the basis for awarding broadcast licenses.

It is difficult to imagine a more unconstitutional abuse of the power of the judicial branch. While this Honorable Court has exercised great deference in considering the actions of Congress which may impinge upon the Constitution, such deference need not be given to the questionable actions of the federal judiciary.

The actions of the Court of Appeals in commanding use of a race-based system by the FCC must stand on their own and cannot draw support from the *ex post facto* pronouncements of the United States Congress in the adoption of the FCC's annual appropriation. Simply because the Congress subsequently prohibited the FCC from expending funds to ensure that the mandated actions of the Court of Appeals met the commands of the Constitution, does not mean that the original orders of the Court of Appeals were constitutional.

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[33] *TV 9, Inc. v. FCC*, 495 F.2d 929 at 938 (D.C. Cir. 1973).

The race-based system adopted by the FCC in 1978, as a result of the decisions of the Court of Appeals, is unconstitutional and must be so declared.

B. The Problematic Nature Of The "Continuing Resolution" As A Constitutional Act Of Congress, And The Unusual Circumstances Under Which The Continuing Resolution For Fiscal Year 1988 Was Adopted, Not Only Cast Doubt Upon Whether Or Not The Continuing Resolution Reflects The Will Of The Congress, But In So Doing Removes This Case From The Protective Ambit Of *Fullilove v. Klutznick*.

The deference traditionally given by this Honorable Court to Congressional actions which appear to tread upon the liberties guaranteed by the Constitution is not warranted in this case for yet another reason. While the adoption by the Congress of legislation which – in accordance with the rules of the U.S. Senate and U.S. House of Representatives – passes through the committees of jurisdiction and expertise, must be treated with some deference by this Honorable Court, the same cannot be said of the Congress' current approach to appropriating funds for various agencies, such as the FCC.[34]

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[34] A recent publication discussed the disturbing trend in Congressional appropriations:

> At the heart of legislative indifference to the constitutional separation of powers is the continuing resolution. The CR, as it is popularly called, is a disreputable instrument of law which has transmogrified the legislative process into a caricature of what the Constitution intended for the legislative

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Thus while it certainly was proper for this Honorable Court to conclude, as it did in *Fullilove v. Klutznick*, that the adoption of the Public Works Employment Act of 1977 was entitled to the deference of this Honorable

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branch. The CR developed from the concept of "supplemental" appropriations bills. These instruments were used to handle circumstances and needs not contemplated when the regular budget or appropriations bills were passed.

Then came the "emergency supplemental" appropriations bill, which was deemed even more necessary and extraordinary. Sometimes, under the guise of meeting budget constraints, the appropriations committees deliberately created the gridlock that made these supplementals necessary by appropriating insufficient funds to cover entitlements . . . . To these instruments was added the increasingly utilized practice of including authorizing language in appropriations bills, contrary to Senate and House rules.

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The next logical step was the omnibus Continuing Resolution. In this new legislative instrument anything and everything was possible. Careful scrutiny of and deliberation over individual items became impossible. For Fiscal Years 1986, 1987, and 1988, the CR took the place of all 13 regular appropriations bills. As a practical matter, the power of the presidential veto became what our Founding Fathers would have called "nugatory" – of no practical utility. In 1988 it was utterly impossible for any member to have read the bill or even to know what was in all of it.

G. Jones & J. Marini, Eds., *The Imperial Congress: Crisis in the Separation of Powers*, (1988), pp. 135-36.

Court due to the deliberative process that preceded the passage and signing into law of that Act, such deference would be misplaced in the instant case:

> Because Congress adjourned for Christmas immediately upon passage of the CR in 1987, the president was confronted with the choice of shutting down the government until Congress could be reconvened, or approving the bill. He chose to approve the bill. It was weeks before many details of what was in the bill were made available, and much of what was there, all observers agreed, would never have stood the test of the traditional method of authorizations, appropriations, and oversight. Included was the abolishment of executive branch offices that had challenged Congressional policy, all kinds of pork-barrell . . . , plus . . . major substantive laws . . . , and scores of other . . . provisions.[35]

While the question of whether the current appropriations process can withstand constitutional challenge – particularly the use of the Continuing Resolution and the inclusion of legislative language in appropriations acts – must await another case, the procedural deficiencies of that process make one point quite clear, even now: the deference which this Honorable Court gave Congress in *Fullilove v. Klutznick* is not warranted here.

C. The Repudiation By The Congress Of The Efforts Of The Federal Communications Commission To Conduct Fact-Finding To Support Or To Abandon The Use Of A Race-Based System Was, If Not *Ultra Vires*, Then At Least An Action Which Removes This Case From The Protective Ambit Of *Fullilove v. Klutznick*.

In *Fullilove v. Klutznick*, this Honorable Court indicated that one important reason for upholding the

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[35] *Id.*, at 136-37.

constitutionality of the use by Congress of a race-based system was the fact-finding undertaken by the U.S. Congress in the adoption of the Public Works Employment Act of 1977.

However, in the instant case, not only was fact-finding not undertaken by the Congress, but the Congress specifically prohibited the FCC from conducting fact-finding regarding the factual and legal basis for the FCC's minority preference policy. While the U.S. Congress would have been empowered to conduct oversight regarding the propriety and accuracy of the FCC's fact-finding, the authors of the FCC language that was included in the Continuing Resolution apparently did not want to know the facts.

While Congress may be able to act in total disregard of the facts of a particular issue, it cannot so act with regard to Constitutional guarantees. At the very least, the Congressional prohibition against fact-finding regarding the FCC's minority preference policy removes the instant case from the protective, deferential ambit of *Fullilove v. Klutznick*.

D. The Deference Shown Congress By This Honorable Court In *Fullilove* Is Not Merited In This Case Since The Factual Underpinnings Of Fullilove Do Not Exist Here.

1. This Is An "As Applied" (Rather Than A "Facial") Challenge.

The decision of this Honorable Court in upholding the constitutionality of the Public Works Employment Act of 1977 in *Fullilove v. Klutznick*, was in response to a facial challenge regarding the ability of the Congress, following

fact-finding, to adopt a race-based system which sought to remedy a history of nationwide racial discrimination in the construction industry.

Such is simply not the case here. This case does not test the abstract ability of the Congress to engage in fact-finding, and, when supported by such fact-finding, to adopt a race-based system as a remedial measure to a history of state-sponsored discrimination. Instead, what is at issue is the ability of Congress, having rejected fact-finding, to use race as a basis to achieve "program diversity."

2. There Was No Fact-Finding Here To Support The Use Of The Race-Based System Used By The Federal Communications Commission.

Unlike *Fullilove v. Klutznick* where this Honorable Court upheld the race-based remedy adopted by Congress, in the instant case there was no Congressional fact-finding to serve as a basis for the refusal of Congress to permit the FCC to reexamine its race-based system.

Justice O'Connor, writing for the majority in *Croson*, acknowledged the importance of Congressional fact-finding to the *Fullilove* decision, noting that the principal opinion in *Fullilove* "focussed on the evidence before Congress that a nationwide history of past discrimination had reduced minority participation in federal construction grants."[36]

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[36] *Croson*, 102 L Ed 2d at 458-467.

Without such fact-finding, a critical underpinning of the decision of this Honorable Court in *Fullilove* is missing from the instant case.

3. There Was No Waiver Provision In The Race-Based System Used By The Federal Communications Commission.

A critical element of the decision by this Honorable Court in *Fullilove v. Klutznick* was the presence, in the Public Works Employment Act of 1977, of a waiver provision which permitted a case-by-case application (narrow tailoring) of that statute which, arguably, would permit the statute to survive judicial scrutiny, *as applied*. Justice O'Connor, writing for the majority in *Croson*, recognized the "flexible nature" of the set-aside utilized in *Fullilove* because of the inclusion in the federal statute of a "waiver" provision. According to Justice O'Connor, Chief Justice Burger "indicated that without that fine tuning to remedial purpose, the statute would not have 'passed muster.' "[37]

However, there is no such waiver in the instant case. Instead, under the FCC minority preference policy, a minority preference is to be applied in each and every comparative licensing proceeding. Again, without such a waiver provision, yet another critical underpinning of the decision of this Honorable Court in *Fullilove* is missing from the instant case.

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[37] *Croson*, 102 L Ed 2d at 487.

4. The Actions Challenged Are Those Of An "Independent Regulatory Agency" Rather Than Congress.

The Federal Communications Commission is an independent regulatory agency. In *Humphrey's Executor v. United States*, this Honorable Court characterized the independent regulatory agency at issue therein as having been created by the Congress so as "not to be 'subject to anybody in the government but . . . only to the people of the United States,' free from 'political domination or control,' or the 'probability or possibility of such a thing.' "[38]

As an independent regulatory agency, the FCC must fulfill its duty to the people of the United States to comply fully with the Constitution's guarantee of equal protection of the law.

This Honorable Court, in addressing the constitutionality of the use by the FCC of a race-based system in the awarding of television broadcasting licenses, need not consider the actions of the Congress in denying the FCC the funds necessary to reconsider the factual and legal underpinnings of the FCC's minority preference policy. As noted above, that policy has its origins in the decisions of the Court of Appeals for the District of Columbia. Application of this Honorable Court's "strict scrutiny" standard to the FCC minority preference policy reveals the constitutional deficiencies of the FCC policy. That policy should therefore be stricken.

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[38] 295 U.S. 602, at 625 (1934).

CONCLUSION

It is difficult to envision a more indefensible use of a race-based system than the one at issue. With no fact-finding, with no allegation or proof of a history of discrimination by government agencies, while seeking the most nebulous and undefined of goals ("program diversity"), eschewing race-neutral alternatives and embracing racial stereotypes, the FCC has adopted an "ageless" and "timeless" race-based program. The minority preference policy of the FCC is a brutal assault on the Constitution. It must be so held by this Honorable Court. The decision of the Court of Appeals should be reversed.

Dated this 9th day of February, 1990.

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